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No. 510

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

WORLD INSURANCE COMPANY,

Appellant,

v.

MRS. GUY D. BETHEA, ADMINISTRATRIX, ESTATE OF DR. GUY D. BETHEA, DECEASED,

Appellee.

On Appeal from the Supreme Court of Mississippi

STATEMENT AS TO JURISDICTION

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STATEMENT AS TO JURISDICTION

Appellant appeals from the final judgment of the Supreme Court of Mississippi entered on March 18, 1957, which affirmed the judgment in favor of the appellee on a policy of insurance, and from the order and judgment of said Court, entered on May 6, 1957, overruling the appellant's suggestion of errors.

Appellant submits this statement to show that this Court has jurisdiction on the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Mississippi entered on March 18, 1957 (R. 309-320) is not yet officially reported. It appears at 93 So. (2d) 624 and is printed herein as Appendix A. The order entered May 6, 1957, overruling the suggestion of errors (R. 344, 322-342) is printed herein as Appendix B.

JURISDICTION

The opinion and judgment of the Supreme Court of Mississippi was entered on March 18, 1957, affirming the judgment of the lower state court in favor of the appellee (R. 309-321). In so doing, however, the Supreme Court of Mississippi for the first time construed Section 5706, Mississippi Code, 1942, in a new and unexpected manner and relied upon that statute as so construed as the basis for its decision. The invalidity of the statute, on the ground of its being repugnant to the Constitution of the United States, was raised by the appellant by filing a suggestion of errors (R. 322-343).[1] The suggestion of errors was overruled by the Supreme Court of Mississippi in an order entered on May 6, 1957 (R. 344). Notice of Appeal to this Court was filed in the Supreme Court of Mississippi on August 1, 1957 (R. 352-353).

Jurisdiction of this Court to review the decision of the Supreme Court of Mississippi by direct appeal is conferred by Title 28, United States Code, § 1257(2).

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[1] Under Mississippi practice, a suggestion of errors is the equivalent of a petition for rehearing.

The following decisions sustain the jurisdiction of this Court to review the judgment by appeal in this case: *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 366-7; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, 677-8; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 320; *Saunders* v. *Shaw*, 244 U. S. 317, 320; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282-283.

STATUTE INVOLVED

§ 5706, Mississippi Code, 1942:

Agent defined — fraudulent representation — penalty. — Every person who solicits insurance on behalf of any insurance company, or who takes or transmits, other than for himself, an application for insurance, or a policy of insurance, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance of any such company, or who shall examine or inspect any risk, or receive, collect or transmit any premium of insurance, or make or forward a diagram of any building, or do or perform any other act or thing in the making or consummation of any contract of insurance, for or with any such insurance company, other than for himself or who shall examine into or adjust or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance, or request, or by the employment of the insurance company, or of, or by any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract; such person knowingly procuring by fraudulent representations, payment, or the obligation for the pay-

ment, of a premium of insurance, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or be imprisoned for not more than one year.

QUESTION PRESENTED

Whether, consistently with the due process clause of the 14th Amendment to the Federal Constitution, a state statute may provide that, notwithstanding express stipulations to the contrary in the contract of insurance, a solicitor of insurance with limited authority is a general agent of the insurer with authority to waive and modify any provision of a policy, so that the insurer is precluded from relying upon the falsity of answers in a written application if the applicant orally gave correct information to the solicitor.

STATEMENT OF THE CASE

Appellant, a corporation organized and existing under the laws of Nebraska, with its home office in Omaha, Nebraska, was authorized by the State of Mississippi to engage in the business of insuring against accident and sickness. In 1954 the appellee's decedent brought an action against the appellant in the County Court of Forrest County, Mississippi to recover monetary benefits under a health and accident policy (R. 2-18). Appellant's defense was that the insured in his written application had made false representations which were material to the risk to be assumed by the insurer, to-wit, (1) that no life, accident or health insurance issued to him had ever been cancelled; (2) that he had never made claim for injury or sickness; (3) that at the time of making said application he was physically and mentally sound to the best of his knowl-

edge and information; (4) that he had never had heart disease or diabetes, and (5) that he had not received medical or surgical advice or treatment, or had any local or constitutional disease within the past five years (R. 31-35). Upon learning of the falsity of the representations in the applications, the appellant had declared the policy void and tendered to the decedent the total amount of premiums paid by him. In its answer to the action it renewed the tender of said premium (R. 30).

The policy on which the action was based included a provision that it was "Issued in consideration of the statements made by the Insured in the application herefor, a copy of which is attached hereto and made a part hereof . . .". It also stated that the policy, including the written attachments, "contains the entire contract of insurance" and that "No Statement made by the applicant for insurance not included herein shall avoid the policy or be used in any legal proceeding hereunder. No agent has authority to change this policy or to waive any of its provisions". (R. 16.)

Over the insurer's objection, evidence was introduced at the trial (and not disputed[2]) that the applicant had orally given the soliciting agent correct information with respect to his medical history and his experience with other insurance; that the agent had written false answers on the application form; that the applicant had signed the application without reading it; and that he had not read the copy of the application which was attached to the policy which he received.

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[2] The soliciting agent had not been employed by the insurer for some time prior to the trial, and he was unavailable as a witness.

The jury to which the matter was submitted returned a verdict for the insured and on March 18, 1955 judgment was rendered against the insurer (R. 56). The latter appealed to the Circuit Court of Forrest County, Mississippi, and assigned as error on the part of the trial court its admission, over the appellant's objections, of evidence as to the oral statements which were made to the soliciting agent (R. 216). The judgment of the trial court was affirmed (R. 218),[3] and in due course an appeal was taken to the Supreme Court of Mississippi in which the admission of the oral statements to the soliciting agent was again urged as error (R. 225). The Supreme Court, in an opinion and judgment entered on March 18, 1957, affirmed the judgment of the lower court (R. 309-320; 321).

The state court held, in reliance upon the statute here in question, that the knowledge and information of the soliciting agent was properly attributed to the appellant. The court stated that:

> The proof shows without dispute that William Cole solicited the insurance on behalf of the defendant and prepared the application therefor and transmitted the same to the defendant, and it is not contraverted, and cannot be successfully contraverted, that in so doing he is held to be the general agent of the defendant under Section 5706 of the Mississippi Code of 1942, which provides that every person who solicits insurance on behalf of any insurance company or who takes or transmits, other than for himself, an application for insurance "shall be held to be the agent of the company for which the act is done or the risk is

[3] During the pendency of the appeal the insured died and the appellee, his administratrix, was substituted.

taken as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract." *Cole's knowledge and information acquired in taking the application was, therefore, the knowledge and information of the defendant* . . . (R. 312-313).[2]

The opinion and judgment of the Supreme Court of Mississippi was rendered on March 18, 1957. On April 9, 1957, the appellant filed its suggestion of errors in that court and requested that the opinion of March 18, 1957, be withdrawn (R. 322-342). In its pleading, in which was incorporated the argument in support of the requested relief, the appellant stated *inter alia* that:

> In *Saucier* v. *Life & Casualty Insurance Company of Tennessee* (1940), 189 Miss. 693, 198 So. 625, our court held that a soliciting agent could not be elevated to the position of a general agent by virtue of the provisions of Section 5196 of the Mississippi Code of 1930, the reenactment of which becomes Section 5706 of the Mississippi Code of 1942 . . . (R. 328).
>
> * * *
>
> The Opinion in the *Saucier* case further concluded that a rule such as is announced in the case at bar, as we understand it, would be violative of Section 14 of the Constitution of 1890, and of the 14th Amendment of the Constitution of the United States, in that such a rule would, in effect, deprive persons engaging in insurance contracts of essential liberty guaranteed to them by these provisions of the State and Federal Constitutions (R. 329).
>
> * * *
>
> We earnestly suggest that the rule announced in the case at bar would be destructive of basic

[2] Italics added.

liberties allowing citizens to contract between themselves . . . (R. 336).

* * *

It would appear that the Opinion of this Honorable Court in the case at bar assumes as a premise that the agent Cole was without authority to alter the express provisions of the contract unless his authority was increased by operation of law and because of the provisions of Section 5706 of the Mississippi Code of 1942. If this premise be upheld, then there remains no method whereby the express written terms of the contract may be given effect and meaning as against the behavior of an agent whose authority is limited by the express terms of the policy. Thus the insurer is denied the effective protection to which a party to a written contract is properly entitled. The agent, by his conduct, although expressly made a limited agent by the terms of the policy and by the terms of his employment, can enlarge the scope of his authority, and his principal is without any means of preventing this assumption of authority by the agent (R. 336-337).

* * *

We believe the effect of the Opinion of this Honorable Court as announced, if permitted to stand, would be to unduly obliterate the status properly accorded to written agreements, and to impair the liberty of contract afforded and guaranteed by Section 14 of the Mississippi Constitution of 1890, and by the 14th Amendment to the Constitution of the United States (R. 339).

* * *

The Opinion of the Court has improperly expanded the provisions of Section 5706 of the Mississippi Code of 1942 to a degree that destroys the constitutional powers of parties to freedom of contract . . . (R. 341).

* * *

> The effect of the Opinion of this Honorable Court is to unduly limit the rights of contracting parties, and to destroy the effective protection to which the parties are entitled by reason of written instruments, and is to abridge rights guaranteed by Section 14 of the Mississippi Constitution of 1890, and by the 14th Amendment to the Constitution of the United States (R. 341).

* * *

On May 6, 1957 the Supreme Court of Mississippi entered an Order which simply stated that "having sufficiently examined and considered" the appellant's suggestion of errors, it was of the opinion that the same should be and, therefore, was overruled. Notice of appeal to this Court was filed on August 7, 1957 (R. 352-354).

THE FEDERAL QUESTION WAS RAISED BELOW

The issue involved in this appeal—namely, whether Section 5706, Mississippi Code, 1942, as construed by the highest court of Mississippi, is repugnant to the 14th Amendment to the Federal Constitution—was raised the very first time that it became germane to the proceedings in the state court.

Until the case reached the final appellate level in the state court system, the judgment against the appellant rested upon common law principles involving the extent to which a principal may be charged with the knowledge of an agent. No Federal question was involved at or prior to the argument of the appeal in the Supreme Court of Mississippi. Neither the trial nor the intermediate appellate court held that the knowledge of the soliciting agent, however limited his authority, was to be conclusively attributed to the ap-

pellant on the ground that he must be deemed to be its general agent by virtue of the aforesaid statutory provision. Moreover, the Supreme Court of Mississippi in *Saucier* v. *Life & Casualty Company of Tennessee*, 189 Miss. 693, 198 So. 625 (1940) had previously held that the statute did *not* increase a soliciting agent's authority to act at variance to the terms of a policy and an application. Indeed the *Saucier* opinion stated that if the statute were construed to raise an insurer's special agent with limited powers into a general agent it would violate the 14th Amendment to the Federal Constitution. Hence, it was not until the Supreme Court of Mississippi rendered its opinion in the instant case on March 18, 1957, that a Federal question arose. For in that opinion it held, unexpectedly and for the first time, that under Section 5706 of the Mississippi Code of 1942 the soliciting agent was a general agent and that "his knowledge and information acquired in taking the application was, therefore, the knowledge and information of the defendant."

In its suggestion of errors addressed to the opinion of March 18, 1957, the appellant pointed out to the Court that as construed and applied by it, Section 5706 of the Mississippi Code of 1942 abridged the appellant's rights under the 14th Amendment to the Constitution of the United States. The quoted references to the suggestion of errors which appears in the "Statement of the Case", *supra*, pp. 7-9, indicate the explicitness with which the federal question was drawn to the attention of the Court. It is submitted, therefore, that in overruling the suggestion of errors on May 6, 1957, the Court necessarily upheld the validity of the state statute against the challenge that it deprived the appellant of its liberty and property

without due process of law, in violation of the 14th Amendment to the Federal Constitution.[5]

Since the federal question was created by an unexpected decision of the highest state court, without any prior opportunity for the appellant to anticipate or assert the question, the petition for rehearing which it filed constituted its first chance to present the matter to the court. Accordingly, the Federal question was timely raised and this Court has jurisdiction of the appeal. *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358, 366-7; *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U. S. 673, 677-8; *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 320; *Saunders* v. *Shaw*, 244 U. S. 317, 320.

THE FEDERAL QUESTION IS SUBSTANTIAL

As construed by the highest state court—a construction which, of course, is conclusive for present purposes[6]—Section 5706 of the Mississippi Code of 1942

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[5] The failure or refusal of the state court to decide the validity of a state statute, without adequate state ground, is the equivalent of a decision "in favor of its validity" for the purpose of 28 U. S. C. § 1257(2). *Cf. Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282-283.

[6] "The Federal Supreme Court, while bound by the construction of the State statute adopted by the state court of last resort, is not concluded by its reasoning, but must exercise an independent judgment when called upon to determine the Federal question whether the act, as construed and applied, is repugnant to the restrictions of the Federal Constitution. Consequently, although it is not open to the United States Supreme Court to reverse the construction placed upon a state statute by the state court, the question is open as to whether the application made of the statute is so arbitrary as to contravene the fundamental principles of justice which the constitutional guaranty of due process of law is intended to preserve." 11 Am. Jur., *Constitutional Law*, § 109.

does more than designate as agents of an insurance company persons who act for it in some particular. It gives these persons absolute power to bind the insurance company without regard to the scope of their apparent authority. Thus the statute raises special agents to whom an insurer by contract has given limited authority into general agents possessing unlimited powers to charge the principal with liability. We submit that a statute of such breadth, which distorts the true relationship of the parties, goes beyond any legitimate legislative purpose and is, therefore, so arbitrary as to deprive the appellant of its liberty and property without due process of law.

This is not to deny the power of Mississippi to regulate the conduct of insurance business as one affected with a public interest. It is well established that a state has the power to prescribe, within constitutional bounds, the terms upon which insurance may be placed and kept in force upon its residents. On the other hand, a state may not regulate business done within its borders by legislative action which is arbitrary or has no reasonable relation to an object within the state authority. *Cf. Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 435. By seeking and obtaining permission to do business in Mississippi, the appellant, a Nebraska corporation, did not thereby become bound to comply with, or estopped from objecting to, the enforcement of state enactments that conflict with the Constitution of the United Sates. *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494, 507; *Connecticut Gen. Life Ins. Co.* v. *Johnson,* 303 U. S. 77, 79-80.

It should be noted that when the contract of insurance was entered into between the appellant and the appellee's decedent the statute in question was con-

strued by the highest court of the state as *not* converting the soliciting agent into a general agent of the appellant. The vice of the statute which is here challenged is that as now construed it constitutes not regulation but oppression, since it makes it virtually impossible for insurance companies in the State of Mississippi to rely upon any written contract with an applicant for insurance to enable it to determine whether or not to assume an insurance risk on the basis of a written application. If insurance companies are precluded from relying upon representations and warranties in written applications, even though the insured is given a copy of the application with his policy, and (as in this case) has the opportunity over a period of years to examine it for any discrepancies between the answers appearing on the application and the true situation, freedom to enter into insurance contracts will have been severely curtailed—far beyond any reasonable demands of the public interest.

This Court has repeatedly held that an insurer may effectively include in its policies provisions which limit the power of insurance agents to waive conditions therein, or which restrict the manner in which waivers may be made, and that such provisions are binding. *New York Life Ins. Co.* v. *Fletcher*, 117 U. S. 519; *Northern Assurance Co.* v. *Grandview Bldg. Assoc.*, 183 U. S. 308; *Aetna Life Ins. Co.* v. *Moore*, 231 U. S. 543; *Prudential Ins. Co.* v. *Moore*, 231 U. S. 560; *Lumber Underwriters of N. Y.* v. *Rife*, 237 U. S. 605; *Sun Ins. Office* v. *Scott*, 284 U. S. 177. If the Mississippi statute had been construed as providing that irrespective of written stipulations in the contract of insurance, any solicitor who obtains an application for insurance on behalf of an insurer is the latter's agent

and not the insured's, and that the insurer is bound to the full extent of the apparent authority of such person, such legislation might be said to have considerable support in the decisions of this Court. *Cf. Stipcich* v. *Metropolitan Life Ins. Co.*, 277 U. S. 311; *American Fire Ins. Co.* v. *King Lumber & Mfg. Co.*, 250 U. S. 2; *Continental Life Ins. Co. of Hartford, Conn.* v. *Chamberlain*, 132 U. S. 304. But a legislative fiat which makes every person acting on behalf of an insurer its *general* agent with unlimited authority to waive, modify or alter a contract, no matter how menial his position or how trivial and restricted his apparent authority, and indeed regardless of the fact that he thereby commits a fraud upon the insurer, cannot be said to have received the sanction of this Court.

The primary purpose of Section 5706 was to control "wildcat" insurance companies[7]—presumably insurers which had not demonstrated their reliability or responsibility because of their failure to comply with statutory requirements for doing business in Mississippi. Accordingly, the burden and responsibility were placed upon any person in the state who purported to act in their behalf. Another apparent purpose of the statute was to settle, as between the parties to the contract of insurance, the relationship of the agent through whom the negotiations for insurance were conducted—that is, to prescribe that he is an agent of the insurer rather than of the insured. In effectuating these purposes the state provided that an insurer was the principal of any person acting in its behalf so far as "duties and liabilities imposed by law" were concerned. The

[7] That was the sole purpose found by the Supreme Court of Mississippi in the *Saucier* case, *supra*. The opinion of the state court in the instant case is silent on this point.

Saucier decision, *supra,* held that the quoted phrase did not refer to duties and liabilities that grow out of a contract of insurance, such duties and liabilities being determined by the provisions of the contract itself, but rather to duties and liabilities imposed upon insurance companies and their agents by law outside and independent of the provisions of the contract of insurance.

A similar Florida statute received the same construction in *Mut. L. Ins. Co.* v. *Hilton-Green,* 241 U. S. 613, in which this Court concluded that it "undertakes to designate as agents certain persons who in fact act for an insurance company in some particular; but it does not fix the scope of their authority as between the company and third persons, and certainly does not raise special agents, with limited authority, into general ones, possessing unlimited power." See, also, *Maryland Casualty Co.* v. *Campbell,* 255 Fed. 437, 441 (C. A. 5), certiorari denied, 250 U. S. 658, in which (referring to the same Florida statute) the court said: "That statute does not have the effect of conferring a power which the contract of the parties shows was explicitly withheld."

The constitutional basis for challenging the Mississippi statute as now construed by the highest state court may be summarized in the language used by the court in the *Saucier* case, *supra,* as follows:

> "The word 'liberty' as used in these sections of the two constitutions [state and Federal], includes liberty of contract and the liberty of contract guaranteed by them is freedom from arbitrary or unreasonable restraint. In order for a statute to survive when confronted with due process of law, it must not appear to be arbitrary or capricious,

but must have a reasonable relation to a legitimate end. To raise an insurance company's special agent with limited powers, into its general agent when acting for it in the particulars specified in the statute, with authority to then make material changes in a policy of insurance issued by the company, manifestly has no relation to the end or object for the accomplishment of which this statute was enacted, or to any other imaginable legitimate legislative end."

The financial stability of insurance companies is a matter of great importance to many million policy holders and their beneficiaries. This depends in great measure on the care exercised in the selection of risks, which, in turn (under the generally known practice), depends on the reliability of the information afforded to the medical officers of the insurer at its home office, by the contents of applications. A statute which purports or is interpreted to convert a special limited agent into a general agent would, in effect, render a contract of insurance so unstable as to destroy the very foundation upon which such contract is built. *Cf. Provident Mut. Life Ins. Co.* v. *Parsons*, 70 F. 2d 863 (C. A. 4), certiorari denied, 293 U. S. 582.

CONCLUSION

For the foregoing reasons we believe that the question presented by this appeal is substantial and that it is of public importance. The appellant respectfully suggests that if this appeal is given plenary consideration, with briefs on the merits and oral argument, it will be able to demonstrate that this particular abridgement by the state of Mississippi of the constitutional rights of insurance companies to enter into agreements

with their insured cannot be justified as a reasonable exercise of legislative authority.

Respectfully submitted,

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September, 1957.

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 40,403

WORLD INSURANCE COMPANY

v.

MRS. GUY D. BETHEA, ADMINISTRATRIX OF THE ESTATE OF DR. GUY D. BETHEA, DECEASED

HOLMES, *Justice:*

This suit was brought by Dr. Guy D. Bethea against World Insurance Company in the County Court of Forrest County. The plaintiff sought to recover certain hospital benefits and certain benefits for disability due to sickness under a health and accident insurance policy theretofore issued to him by the defendant. The plaintiff alleged that he became totally disabled due to sickness on or about December 9, 1953, and so continued, and that the defendant had become indebted to him for the benefits thereafter accruing under the terms and provisions of the policy but had failed and refused to pay the same. The plaintiff sued for hospital benefits alleged to have accrued in the sum of $743.16 from the date he became totally disabled to the date of filing suit, a period of approximately seven months, and for benefits for disability due to sickness in the amount of $2100 alleged to have accrued at the rate of $300 per month for the same period, and demanded judgment of the defendant for the total sum of $2843.16.

The defendant, by appropriate answer, denied liability and averred as an affirmative defense that the insured had failed to disclose in his application for the insurance certain information which was material to the risk, and had made false answers to questions propounded in the application which materially affected the risk to be assumed, and that the policy was therefore void. The defendant particularly averred in its answer that the insured in his

application made the following false representations which were material to the risk to be assumed by the defendant: (1) That no life, accident or health insurance issued to him had ever been cancelled or renewal refused; (2) that he had never made claim for injury or sickness; (3) that he was at the time of making said application for insurance sound physically and mentally to the best of his knowledge and information; (4) that he had never had heart disease or diabetes; (5) that he had not received medical or surgical advice or treatment, or had any local or constitutional disease within the past five years. The defendant tendered with its answer the premiums theretofore paid on the policy in the sum of $856.80. which tender the plaintiff refused.

The plaintiff responded to the defendant's affirmative defense and denied any concealment of material information in his application or that he had made false answers to the questions therein propounded; and averred that the application for the insurance was prepared by an agent of the defendant who wrote the answers appearing therein and that the plaintiff made full disclosure of all matters with reference to which inquiry was made in the application and made truthful answers to the questions therein propounded, fully disclosing to the agent truthful answers to all questions therein propounded, but that the agent had failed to correctly write in the applications the answers which had been given by the plaintiff.

The evidence was directed to the issues thus raised by the pleadings and on the submission to the jury of these issues, the jury returned a verdict for the plaintiff for the full amount sued for and judgment was entered accordingly. The defendant appealed to the circuit court. Pending the appeal to the circuit court, the plaintiff died and the cause was revived in the name of Mrs. Guy D. Bethea, administratrix of the plaintiff's estate. The circuit court affirmed the judgment of the county court, and the defendant appeals to this Court.

The circumstances surrounding the issuance of the policy and culminating in this suit appear without dispute in the record. William Cole, an agent of the defendant, solicited the insurance here involved and prepared the application therefor and wrote in the answers to the questions therein propounded and transmitted the application to the defendant. The application was dated November 30, 1950, and the plaintiff signed it without reading it. Thereafter, in consideration of the first annual premium of $190.20, which the plaintiff paid, and annual renewal premiums of $170.20 each, the defendant, on January 5, 1951, issued to the plaintiff the policy sued on. The policy provided certain hospital benefits and also benefits for total disability due to sickness in the amount of $200 per month. Later, for an additional premium, the monthly benefits for disability due to sickness were increased to $300 per month. The plaintiff became totally disabled due to sickness on or about December 9, 1953, and made demand upon the defendant for the benefits provided in the policy. The defendant denied liability upon the grounds hereinbefore stated, and this suit followed.

The paramount question involved is whether the defendant is relieved of liability on the policy upon the ground that the insured failed to disclose in his application information material to the risk to be assumed and gave false answers to questions propounded in the application which materially affected the risk to be assumed. The solution of this question involves a consideration of the evidence.

The proof shows without dispute that William Cole solicited the insurance on behalf of the defendant and prepared the application therefor and transmitted the same to the defendant, and it is not contraverted, and cannot be successfully contraverted, that in so doing he is held to be the general agent of the defendant under Sec-

tion 5706 of the Mississippi Code of 1942, which provides that every person who solicits insurance on behalf of any insurance company or who takes or transmits, other than for himself, an application for insurance "shall be held to be the agent of the company for which the act is done or the risk is taken as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract." Cole's knowledge and information acquired in taking the application was, therefore, the knowledge and information of the defendant. . . . . The plaintiff testified that he was engaged in the practice of Dentistry in the City of Hattiesburg; that the agent came to his office and solicited the insurance and prepared the application; that the agent read to him the questions in the application and that he gave truthful answers thereto; that the answers appearing in the application were written therein by the agent but were not the true answers given by the plaintiff; that he made full disclosure to the agent of his past medical history and past condition of health and past dealings with other insurance companies; that he told the agent that he had previously made a claim for sickness for gall bladder trouble under a policy of insurance which he had with the Interocean Insurance Company, and that the company paid the claim and then cancelled the policy; that he truthfully told the agent that he had never previously had heart trouble or diabetes, and explained to the agent that when he was hospitalized for gall bladder trouble in 1949 the doctors at first thought he had heart trouble but later determined that it was gall bladder trouble; that he truthfully told the agent at the time of making the application for insurance that he was sound physically and mentally to the best of his knowledge and information; that he told the agent that during the preceding five years he had medical advice or treatment from Dr. W. R. Bethea, Dr. S. E. Bethea, Dr. L. T. Carl and Dr. R. H. Clark, who has since died. The plaintiff further testified that in connec-

tion with his claim against the Interocean Insurance Company he gave to Dr. Clark a blank form to be filled out and signed and that he never thereafter saw the blank form and did not know how the same had been filled out by Dr. Clark. The foregoing testimony of the plaintiff is not contradicted.

Dr. S. E. Bethea testified that the plaintiff became totally disabled in December 1953 due to diabetes and a nervous condition with degeneration of the brain, and that he was still totally disabled at the time of the trial. He testified further that he had treated the plaintiff in 1947 and that he and Dr. Clark had treated the plaintiff in 1949 when the plaintiff was hospitalized due to gall bladder trouble. He further said that it was at first thought that the plaintiff had heart trouble, that is, a coronary occlusion, but that it proved to be gall bladder trouble. He identified the hospital records which were offered in evidenced and which showed that during the period of the plaintiff's hospitalization in 1949, his attending physicians were Dr. S. E. Bethea and Dr. R. H. Clark, and that he was being treated for gall bladder trouble. This witness further testified that in 1947 Dr. Carl examined the plaintiff and electrocardiagrams and x-rays were made, and that they disclosed neither diabetes nor heart trouble. He said that the electrocardiagrams showed some suggestive changes in one lead but that such condition might show in anyone, and that the plaintiff did not have heart trouble. He also testified that an examination of the plaintiff for blood sugar was made and that this showed normal. He said that he was unable to account for the fact that Dr. Clark had written in the proof of claim to the Interocean Insurance Company a diagnosis of coronary occlusion, since he and Dr. Clark had both agreed that the plaintiff's trouble was gall bladder trouble.

Mrs. Polly Welch testified that on November 30, 1950, she was employed by the plaintiff in his dental office and

that she recalled a man coming to the office on or about November 30, 1950, and representing himself to be an insurance man and discussing insurance with the plaintiff, but that she did not recall the man's name. She said that at that time she had been working for the plaintiff about six months. She later testified that she began working for the plaintiff on or about December 14, 1949. She at first testified that the name of the insurance company purported to be represented by the agent was the Great Western Life Insurance Company. Later she said, however, that she was uncertain and confused as to the name of the insurance company. She testified that she heard the man discussing insurance with the plaintiff and that the man sat down at her desk in the office and asked questions of the plaintiff and prepared the application and wrote in such answers as appeared therein. She recalled hearing the agent ask the plaintiff if he had had a physical in the last five years, to which the plaintiff replied in the affirmative, and she recalled hearing the plaintiff tell the agent that he had had some trouble "a while back" and that he was accused of having a heart attack but that it ended up being his gall bladder. She recalled also hearing the plaintiff tell the agent about a policy of insurance which he had had with another company and that the company had paid a claim which he presented but had cancelled the policy. She also testified that she heard the plaintiff tell the agent that he had a physical ever so often and that he had Dr. W. R. Bethea in Jackson to examine him occasionally, and also consulted Dr. Ernest Bethea and Dr. Carl.

The defendant offered proof of the form signed by Dr. Clark dated in June 1949 and showing a diagnosis of a coronary occlusion. The defendant also offered proof of the fact that the plaintiff, prior to the application here involved, had a policy with the Interocean Insurance Company and collected a claim thereunder, and that such policy was thereafter cancelled. The defendant further offered

testimony to the effect that the answers in the application were material to the risk and that if it had known or been informed that the answers were not true it would not have issued the policy.

The issue as to whether or not the plaintiff in making the application had concealed information material to the risk, or failed to make a full disclosure of matters and facts material to the risk, or failed to truthfully and correctly answer the questions propounded in the application was submitted for the determination of the jury under proper instructions. The jury determined this issue adversely to the defendant, and we are of the opinion that the jury was amply warranted under the evidence in so doing.

The appellant contends, however, that parol evidence to contradict the answers written in the application was inadmissible as varying the terms of a written contract, and that, therefore, the court erred in overruling the motion of the defendant to exclude this evidence and to direct a verdict for the defendant. We do not think that this contention of the defendant is well-founded. This Court has settled the proposition that if the agent of an insurance company undertakes the preparation of an application for insurance in his company, and by a mistake or omission fails to write down correctly the applicant's answers to the questions propounded, his company will be bound by such answers just as if they had been written down in the language used by the applicant and presented thus to the company for its action. In the early case of Planters Insurance Co. v. Myers, 55 Miss. 479, this Court, in dealing with its same proposition, said:

"There are two lines of decision in the books, which pursue divergent lines. The one holds that parol testimony is inadmissible to show the participation of the agent in the preparation of the application—as, that correct responses were made to the interrogatories, but, on the

suggestion of the agent, an incorrect result of such responses was written down by the agent, or the applicant at his dictation. These decisions rest on the idea that the object and effect of the testimony is to vary or contradict the written contract. Such were the earlier cases in New York and many other states . . . The other class, of later origin, rapidly increasing in numbers and favor, declares that insurance companies constituting local agents to canvass for business, take and forward applications, collect premiums, and giving binding contracts of insurance for fifteen days pending applications (such agents as Wilson), must be held responsible for the acts and declarations of the agents, within the scope of the employment, as if they proceeded from the principal."

The Court further said: "We adopt the doctrine of those cases which hold that, if the agent takes charge of the preparation of the application, or suggests or advises what shall be answered, or what will be a sufficient answer, the company shall not avoid the policy because they are false or untrue, if full disclosures were made by the applicant to him."

Like conclusions were reached by the Court in Fidelity and Casualty Company of New York v. Cross, 131 Miss. 632, 95 So. 631, Home Insurance Company of New York v. Thornhill, 165 Miss. 787, 144 So. 861, and the more recent case of Calvert Fire Insurance Company v. Swain, 79 So. 2nd 537.

Much is said in the argument by the appellant with reference to negligence on the part of the applicant in not reading the application. On this point, the Court, in Home Insurance Company of New York v. Thornhill, supra, quoted with approval the following: ". . . the insured is not chargeable with such negligence as will render him liable for false answers inserted by the agent merely because he signed the application in blank and trusted to

the agent to fill it out, or because he signed an application filled out by the agent without reading it."

Appellant relies upon the cases of Fidelity Mutual Life Insurance Company v. Mrs. Emma S. Miazza, 93 Miss. 18, 46 So. 817, and Fire and Marine Insurance Company v. Nix, 162 Miss. 669, 138 So. 598. These cases involve misrepresentations made by the applicant to the insurance company and are readily distinguishable under the facts and are not applicable to the case before us.

In view of the facts of the case before us and the settled decisions of this Court, we are of the opinion that the court was correct in overruling the motion of the defendant to exclude the evidence and direct a verdict for the defendant.

It is further contended by the defendant that the court erred in not sustaining its motion to exclude the testimony of Mrs. Welch. This motion was based upon the grounds that Mrs. Welch had testified that the insurance company involved was the Great Western Life Insurance company, and had also testified that she started to work for the plaintiff in December 1949 and that it was about six months thereafter when the application for insurance was prepared in the plaintiff's office. Mrs. Welch later testified that she was somewhat confused as to the name of the insurance company. She also testified that she recalled hearing the agent ask the plaintiff if he had had a physical in the last five years and that the plaintiff answered in the affirmative and told the agent that he had had some trouble "a while back" and he was accused of having a heart attack but that it ended up as gall bladder trouble.

She also testified that she heard the plaintiff tell the agent that he had a policy with another company and had presented a claim to that company and the company had paid him but had cancelled the policy. She testified further

that she heard the plaintiff tell the agent that he had a physical ever so often and that he had Dr. W. R. Bethea in Jackson to examine him occasionally, and also consulted and was examined and treated by Dr. Ernest Bethea and Dr. Carl. We do not think that the discrepancies in Mrs. Welch's testimony with reference to the name of the insurance company involved, or with reference to accuracy in fixing the period of time that elapsed between the beginning of her employment by the plaintiff and the taking of the application are such as to render her testimony inadmissible. We are of the opinion that such discrepancies as may have existed in her testimony went to the weight of the evidence and were for the consideration of the jury.

We are accordingly of the opinion that the judgment of the court below should be and it is affirmed.

AFFIRMED.

ROBERDS, P. J., and LEE, ARRINGTON and ETHRIDGE, J. J., concur.

APPENDIX B

Monday, May 6, 1957, Court Sitting .....

No. 40,403

WORLD INSURANCE COMPANY

VS.

MRS. GUY D. BETHEA, ADMINISTRATRIX OF THE ESTATE OF DR. GUY D. BETHEA, DECEASED

This cause this day came on to be heard on the suggestion of error filed herein, and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled, doth order and adjudge that said suggestion of error be and the same is hereby overruled.

Office - Supreme Court, U.S.
FILED
OCT 22 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 510

WORLD INSURANCE COMPANY, *Appellant*,

v.

MRS. GUY D. BETHEA, ADMINISTRATRIX, ESTATE OF DR. GUY D. BETHEA, DECEASED, *Appellee*.

On Appeal from the Supreme Court of Mississippi

MOTION TO DISMISS BY APPELLEE FOR WANT OF JURISDICTION AND OTHER GROUNDS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 510

WORLD INSURANCE COMPANY, *Appellant,*

v.

MRS. GUY D. BETHEA, ADMINISTRATRIX, ESTATE OF DR. GUY D. BETHEA, DECEASED, *Appellee.*

On Appeal from the Supreme Court of Mississippi

MOTION TO DISMISS BY APPELLEE FOR WANT OF JURISDICTION AND OTHER GROUNDS

And now comes appellee herein and moves this Honorable Court that the appeal be dismissed, Rule 16 (1) (a) and (1) (b).

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi (R. 309-320) (App. A of Statement As To Jurisdiction) appears in 93 So. (2d) 624 (not yet officially reported). The order overruling the suggestion of error appears at page 344 of the record (App. B of Statement As To Jurisdiction).

JURISDICTION

There is a want of jurisdiction for review and appellant's Statement As To Jurisdiction to confer jurisdiction by direct appeal under Title 28, United States Code, Section 1257(2) is without substance and is not supported by the record or the applicable decisions of this Court.

STATUTE INVOLVED

The statute involved is Section 5706 of the Mississippi Code of 1942, and same appears in pages 3-4 of appellant's Statement As To Jurisdiction.

QUESTION PRESENTED

The question presented appears on page 4 of appellant's Statement As To Jurisdiction.

STATEMENT OF THE CASE

Appellee's decedent, Dr. Guy D. Bethea, filed suit in the County Court of Forrest County, Mississippi, for the recovery of benefits then accrued, under a health and accident policy issued to him by appellant (R. 2-17). Appellant, as an affirmative defense, pleaded that false representations were made by the insured in his written application for the policy of insurance, which were material to the risk assumed by the insurer, and that such representations were false and known to be false by the insured (R. 33). The insured Dr. Bethea, responded to the affirmative matter contained in the answer of insurer (R. 36-39), as follows: (1) he denied that he represented that no life, accident or health insurance issued to him had been cancelled, but alleged that he, in fact, told appellant's insurance agent that a policy had been cancelled or a

renewal refused; (2) he denied that he represented that he had never made claim for injury, but alleged that, in fact, he told the said agent of appellant that he had so done; (3) he admitted that he told the appellant's agent he was mentally and physically sound to the best of his knowledge at the time of the making of application for insurance; (4) he admitted that he told said appellant's agent that he had never had heart trouble or diabetes; and (5) he denied he told the said agent that he had not received medical or surgical advice or treatment, or had any local or constitutional diseases within the preceding five years, but alleged that he had, in fact, told appellant's agent that he had had gall bladder trouble in 1949, and that he had had physical checkups in 1947 and 1949.

The case was tried before a jury in the County Court upon the pleadings, evidence and issues of fact presented thereon, and upon instructions of the court, and the jury returned a verdict in favor of the insured, Dr. Bethea, in the principal sum of $2,926.56 (R. 56-57), which represented the accrued amount due up to the time of the filing of the Declaration (R. 2-17). Appellant then filed a motion for a new trial and to set aside the judgment, but did not raise a federal question (R. 58-59). The above motion for a new trial was overruled and appellant appealed to the intermediate appellate Circuit Court of Forrest County, and filed an assignment of error therein, but did not raise a federal question (R. 216). While the case was pending on the appeal in the intermediate appellate Circuit Court, Dr. Bethea died and the appeal procedure was revived in the name of his wife, as administratrix, who is the appellee herein. The intermediate appellate Circuit Court affirmed the judgment of the lower court (R. 218-219), and appellant prosecuted an appeal to the

Supreme Court of Mississippi, and filed therein its assignment of error, but did not raise a federal question (R. 225-226), and the Supreme Court of Mississippi affirmed the case (R. 309-320; App. A of Statement As To Jurisdiction); 93 So. (2d) 624. The court, in its opinion, said that:

> The paramount question involved is whether the defendant is relieved of liability on the policy upon the ground that the insured failed to disclose in his application information material to the risk to be assumed and gave false answers to questions propounded in the application which materially affected the risk to be assumed. *The solution of this question involves a consideration of the evidence.*[1] (R. 312)
>
> The proof shows without dispute that William Cole solicited the insurance on behalf of the defendant and prepared the application therefor and transmitted the same to the defendant, *and it is not controverted,*[2] and cannot be successfully controverted, that in so doing he is held to be the general agent of the defendant under Section 5706 of the Mississippi Code of 1942, which provides that every person who solicits insurance on behalf of any insurance company or who takes or transmits, other than for himself, an application for insurance "shall be held to be the agent of the company for which the act is done or the risk is taken as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract". Cole's knowledge and information acquired in taking the application was, therefore, the knowledge and information of the defendant. (R. 312-313)
>
> * * *

[1] Italics added.

[2] Italics added.

> The appellant contends, however, that parol evidence to contradict the answers written in the application was inadmissible as varying the terms of a written contract, and that, therefore, the court erred in overruling the motion of the defendant to exclude this evidence and to direct a verdict for the defendant. We do not think that this contention of the defendant is well-founded. This Court has settled the proposition that if the agent of an insurance company undertakes the preparation of an application for insurance in his company, and by a mistake or omission failed to write down correctly the applicant's answers to the questions propounded, his company will be bound by such answers just as if they had been written down in the language used by the applicant and presented thus to the company for its action. (R. 316-317) . . . Like conclusions were reached by the Court in . . . Home Insurance Company of New York v. Thornhill, 165 Miss. 787, 144 So. 861, . . . (R. 318).

Appellant filed a suggestion of error to the opinion of the Supreme Court of Mississippi, and assigned four definite and expressed points as grounds thereof (R. 325-326), but said points did not raise a federal question, and it was in the written Argument and Brief on the suggestion of error (R. 327-342) that appellant, for the first time, attempted to raise the claimed federal question, and the suggestion of error was overruled, without an opinion. Subsequently, appellant filed his notice of appeal (R. 352-354), and in this Honorable Court, appellant contends that a federal question was created by an unexpected decision of the Supreme Court of Mississippi, without any prior opportunity for the appellant to anticipate or assert the question, and that the petition for rehearing constituted its first chance to present the matter to the state court, and that appellant could assert such federal question for

the first time in its Argument and Brief filed in the Supreme Court of Mississippi on the suggestion of error.

Provided all other federal jurisdictional requirements are met, as applied and construed under Title 28, United States Code, Section 1257(2), the whole point therefore, is whether the ruling here assailed should have been anticipated.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED OR EXPRESSLY PASSED ON

Appellant did not raise, as required under state procedure, a federal question by pleadings (Section 1475.5 of the Mississippi Code of 1942), evidence, motions, or assigned errors, in either the lower trial court (R. 58-59), intermediate appellate Circuit Court (R. 216), or in the Supreme Court of Mississippi (R. 225-226). Claimed errors, required under state procedure, must be pursued on appeal from the trial court to the Supreme Court of Mississippi. Appellant did not raise a federal question as a specific or assigned ground for rehearing in its suggestion of error (R. 325-326), and inasmuch as appellant, by argument, attempted to raise a federal question in its argument and brief on the suggestion of error, such argument and brief (R. 327-342) cannot be used to establish that a federal question was raised. *Live Oak Ass'n* v. *Railroad Commission,* 269 U.S. 354, 357-8; *Lynch* v. *New York ex rel. Pierson,* 293 U.S. 52, 54.

No federal question was involved and the Supreme Court of Mississippi did not rule on a federal question (R. 309-320) and never had an opportunity to rule on a federal question because such question was not raised,

but if it be construed that a federal question could be raised for the first time in this case in the Argument or Brief on the suggestion of error, or Notice of Appeal to this Court, then appellee submits that the raising of such question was not properly or timely raised under the well established rules of practice and procedure in Mississippi as well as the applicable decisions of this Court. *Revised Rules of the Supreme Court of Mississippi*, 215 Miss. 597, 599, (Rule 6), 600, (Rule 7), 602, (Rule 14); *Adams* v. *Board of Sup'rs of Union County*, 177 Miss. 403, 170 So. 684; *Hassie Hunt Trust* v. *Proctor*, 215 Miss. 84, 60 So. (2d) 551; *Comfort* v. *Landrum*, (Miss.), 52 So. (2d) 658; *Vinson* v. *Cooley*, (Miss.), 54 So. (2d) 750; *Smith* v. *Williams*, 36 Miss. 545; *DeMoe* v. *McLeod*, (Miss.), 87 So. (2d) 906, suggestion of error overruled, 89 So. (2d) 730; *Frady* v. *Bryan*, 210 Miss. 1, 48 So. (2d) 611; *Havard* v. *Board of Sup'rs*, 220 Miss. 359, 70 So. (2d) 875. Therefore, the Supreme Court of Mississippi was under no duty to rule on a question not specifically assigned as a point in the assignment of errors.

The same rule applies on the suggestion of error. No federal question was specifically raised as a ground for rehearing in the suggestion of error (R. 325-326), and if it was raised, the Supreme Court of Mississippi was under no duty to rule on it under state procedure. The Supreme Court of Mississippi was under no duty to grant a rehearing on the suggestion of error. *Taylor* v. *Copeland*, 183 Miss. 85, 183 So. 519, overruling suggestion of error, 183 Miss. 85, 181 So. 742; *Stone* v. *Martin Veneer Corp.*, 183 Miss. 712, 184 So. 435; *Gulf Refining Co.* v. *Harrison*, 201 Miss. 294, 30 So. (2d) 807; *Mississippi Oil & Gas Bd.* v. *Superior Oil Co.*, 202 Miss. 139, 32 So. (2d) 200; *Luck* v. *Seal*, 129 Miss.

228, 91 So. 386. The proper method of raising the federal question was dependent upon the foregoing state practice, at least as long as appellant had a reasonable opportunity to have his case heard and determined. *Central Union Co.* v. *Edwardsville*, 269 U.S. 190, 194-5; *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U.S. 447, 462-3; *Parker* v. *Illinois*, 333 U.S. 271, 574-5; *John* v. *Paullin*, 231 U.S. 583, 585; *Bailey* v. *Anderson*, 326 U.S. 203, 206-7.

THERE IS A WANT OF JURISDICTION

There is a want of jurisdiction for review in this case, *supra*. The federal question was not timely or properly presented to the state court unless upon the suggestion of error (R. 325-326), or Argument or Brief in support of same (R. 327-342). The Supreme Court of Mississippi refused to consider them. The general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. *Herndon* v. *Georgia*, 295 U.S. 441, 443. Appellant contends that the present case falls within an exception to the general rule—namely, that the claimed federal question respecting the validity of Section 5706 of the Mississippi Code of 1942, as applied by the Supreme Court of Mississippi, created an unexpected decision, without any prior opportunity for appellant to anticipate or assert the matter to the Supreme Court of Mississippi. This contention is without substance and is not supported by the record. This is not a case where, as in *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U.S. 358, 366, the federal jurisdiction claimed resulted from stipulation of counsel and followed by acquiescence of the state court, or *Brinker-*

hoff-Faris Trust Co. v. *Hill*, 281 U.S. 673, 678, where the federal claim was raised at the first opportunity which involved the state trial court refusing to hear plaintiff's complaint, or *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313, 319-20, where the question could not have been presented earlier and the federal claim was charged as a ground for rehearing, or *Saunders* v. *Shaw*, 244 U.S. 317, 319-20, where the act of the state Supreme Court denied rights unexpectedly, and where the intervening defendant was denied the opportunity to present his evidence and the federal jurisdiction arose from a denial of opportunity to be heard, due to the unanticipated disposition of the case in the state Supreme Court. Therefore, it appears from the cases, *supra*, as applied to appellant raising a federal question in its petition for rehearing, that before this Honorable Court will review, there must be a denial of the right to be heard or an opportunity to be heard on the issue presented. Appellant was fully heard under state practice and procedure.

THIS CASE AND THE SAUCIER CASE DISTINGUISHED: The case of *Saucier* v. *Life & Casualty Company of Tennessee*, 189 Miss. 693, 198 So. 625 (1940), cited in appellant's Statement As To Jurisdiction, is not applicable to the facts in this case or the applicable Mississippi law, and will not support federal jurisdiction, but supports appellee's contention that the decision of the Supreme Court of Mississippi rested on nonfederal grounds. Appellant contends (R. 332) that the acts of the agent in the case at bar, as in the *Saucier* case, were both done against a direct stipulation in the policy prohibiting such actions (R. 329). Appellant presumes in its suggestion of error that the premise of the court was that the agent, Cole, was without authority

to alter the expressed provisions of the contract unless his authority was increased by operation of law, and because of the provisions of Section 5706 of the Mississippi Code of 1942 (R. 336-337). Appellee submits that this was not the premise of the Supreme Court of Mississippi in its opinion (R. 309-320). The state Supreme Court based its opinion upon the controlling law as set out in *Home Insurance Company of New York* v. *Thornhill,* 165 Miss. 787, 144 So. 861 (1932), and other like decisions, cited with approval by the state court (R. 318). In the *Saucier* case, the agent attempted to waive advance payment of the initial premium, required by written provision in the policy as being necessary to bind the company. The court, in the *Saucier* case, held that the provisions of Section 5196 of the Mississippi Code of 1930, the reenactment of which is 5706 of the Mississippi Code of 1942, could not increase the powers of the special agent therein to the powers of a general agent with authority to then make material changes in a policy of insurance, and that such a statute, so construed, would be in violation of the Fourteenth Amendment of the Federal Constitution. However, in the *Thornhill* case, as in the case at bar, the agent filled out the application erroneously with knowledge of the correct answers having been given to him by the insured. The court, in the *Thornhill* case, stated that the effect of the aforesaid statute, *supra,* was merely to write out of the contract of insurance any limitation on the common law liability of the principal for the knowledge of his agent acquired in the taking of the application, considering it a burden or liability imposed by law within the meaning of the statute. However, in the *Saucier* case, the court considered that there was no burden or liability im-

posed by law, within the purview of the statute, that would permit the special agent therein to deliver the policy without collecting the advance premium in violation of the policy provisions. The *Thornhill* case, as in the case at bar, does not vest powers in the agent, by application of said statute, but merely protects the common law rule of liability of a principal for the knowledge acquired by his agent in the taking of the application of insurance. Furthermore, in the case at bar, it is not controverted that Cole, appellant's agent, was the general agent of appellant (R. 312). The policy of insurance in the *Thornhill* case, as in the *Saucier* case, and the case at bar, all contained provisions of similar import, as to the limitations of power of any agent to waive, alter or modify any terms of the contract of insurance. Therefore, appellee contends that the *Saucier* case is not applicable or controlling in the case at bar, but in fact, the *Thornhill* case is the existing law in the State of Mississippi relative to the application of Section 5706 of the Mississippi Code of 1942. Therefore, if the Supreme Court of Mississippi based its decision on the existing *Thornhill* rule, then appellant's contention that the decision in the case at bar came by surprise from an unanticipated ruling, without prior opportunity to assert or claim a federal question, which could not have been reasonably anticipated from prior decisions, is without substance in this Honorable Court since the rule in the *Thornhill* case was in existence and applicable at the time of the institution of this suit by appellee's decedent.

From the appellee's "Statement of the Case", *supra*, it clearly appears that appellant had had ample opportunity in the pleadings (Section 1475.5 of the Mississippi Code of 1942), motions, and objections in the

trial court, assignment of error in the intermediate appellate Circuit Court, and in the Supreme Court of Mississippi, to present the question and objection to Section 5706, of the Mississippi Code of 1942 (pp. 3-4 of the Statement As To Jurisdiction), as one arising under the Fourteenth Amendment.

Appellant had had ample opportunity earlier than in its Argument or Brief on the suggestion of error, or in its Notice of Appeal (R. 352-354) to present its objection as one arising under the Fourteenth Amendment. *Herndon* v. *Georgia*, 295 U.S. 441, 443-4; *Corkran Oil & Development Co.* v. *Arnaudet*, 199 U.S. 182, 193-4; *Godchaux Co.* v. *Estopinal*, 251 U.S. 179, 181; *Live Oak Ass'n* v. *Railroad Commission*, 269 U.S. 354, 357; *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 162, 164. See also *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128; *Forbes* v. *State Council*, 216 U.S. 396; *Simmerman* v. *Nebraska*, 116 U.S. 54; *Consolidated Turnpike Co.* v. *Norfolk & O. V. R. Co.*, 228 U.S. 326, 333-4.

Therefore, appellant (an insurance company) was chargeable with knowledge of the decisions of the Supreme Court of Mississippi involving principal and agent and particularly insurance law, as well as the *Saucier* case, *supra*, and Mississippi Code Section 5706, in all stages of this case, and had ample opportunity to raise any and all questions. Moreover, the opinion of the Supreme Court of Mississippi is based upon "a consideration of evidence" (R. 312), and its opinion rests upon the evidence and the applicable Mississippi law announced in *Fidelity & Casualty Company of New York* v. *Cross*, 131 Miss. 632, 95 So. 631; *Home Insurance Company of New York* v. *Thornhill*, 165

Miss. 787, 144 So. 861; *Calvert Fire Insurance Co.* v. *Swain*, 79 So. (2d) 537. This Honorable Court will not pass upon the question of the constitutionality of a state statute which was not raised in the proceedings in the state court, and which those courts had no opportunity to decide, *Adler* v. *Board of Education*, 242 U.S. 485; *Young* v. *Masci*, 289 U.S. 253, or where a state court did not pass on a question whether a state statute is a violation of a provision of the Federal Constitution, *State Farm Mut. Auto. Ins. Co.* v. *Duel*, 324 U.S. 154. Moreover, appellant's contention is without substance since it has failed to establish that the validity of the statute can be challenged in its Argument and Brief advanced for the first time in the appellate court on the suggestion of error. *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 659, 651.

THE JUDGMENTS AND OPINIONS OF THE SUPREME COURT OF MISSISSIPPI REST ON ADEQUATE NON-FEDERAL BASIS AND ON ADEQUATE STATE GROUNDS

(1) State procedural law, which forbids the raising of federal questions, or any other questions, as Mississippi, at late stages in the case or by any other than a prescribed method, *supra*, is a valid exercise of state power, *Williams* v. *Georgia*, 349 U.S. 375, 382. This Honorable Court is without power to decide whether constitutional rights have been violated when the federal questions, as in this case, are not seasonably raised in accordance with the requirements of state law, *Edelman* v. *California*, 344 U.S. 357, 358-9, and non-compliance with such local law is thus an adequate state ground for the decision below, *Edelman* v. *California*, *supra*.

(2) Where, as in this case, the judgments and opinions of the Supreme Court of Mississippi shows that the decision *might* have rested upon a nonfederal ground, this Honorable Court will not take jurisdiction to review the judgment. *Durley* v. *Mayo*, 251 U.S. 277, 281.

(3) Where, as in this case, the decision of the Supreme Court of Mississippi *might* have been either on a state ground or on a federal ground, and the state ground is sufficient to sustain the judgment, this Honorable Court will not undertake to review the judgment. *Durley* v. *Mayo, supra.*

(4) The finding of fact by the Supreme Court of Mississippi and the evidence shown by said opinion is broad enough without reference to the claimed federal question to sustain the state court judgment, *Murdock* v. *Memphis*, 20 Wall. 590, 636, and such finding of fact is independent of any claimed federal question. This Honorable Court generally will not reexamine the state court's findings and conclusions of fact. *Grayson* v. *Harris*, 267 U.S. 352, 358; *Portland R. Co.* v. *Railroad Commission*, 229 U.S. 397, 412; *Fry Roofing Co.* v. *Wood*, 344 U.S. 157, 160.

THE QUESTION IS INSUBSTANTIAL

The Supreme Court of Mississippi has not evaded a federal question. The claimed federal question (p. 4 of Statement As to Jurisdiction) was not timely or properly raised, or passed on, but if it be construed otherwise, the question presented is not substantial. Save only as to this Honorable Court, the decision of the lower court is conclusively settled by the decision of the state court, and this Honorable Court may now

inquire whether the decision of the state court rests upon a fair or substantial basis and will examine the decision only to make certain that the nonfederal ground is not so colorable or insubstantial as to be in effect an evasion of the claimed constitutional issue. *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 654. It appears on the face of the opinion that the decision of the state court did not involve a federal question and it is, therefore, not reviewable. *McMillen* v. *Ferrum Min. Co.*, 197 U.S. 343, 347; *Pim* v. *St. Louis*, 165 U.S. 273, 274; *Steines* v. *Franklin*, 14 Wall. 20, 21.

The claimed federal question was not clearly necessary to a decision of this case. *Minnesota* v. *National Tea Co.*, 309 U.S. 551, 555. A decision of a state court upon a question of law, as in this case, cannot be reviewed as presenting a question of the violation of the Fourteenth Amendment because such decision is asserted by appellant to be wrong, and contrary to previous decisions of the Supreme Court of Mississippi. *Patterson* v. *Colorado ex rel. Attorney General*, 205 U.S. 454, 460.

Without Section 5706 of the Mississippi Code of 1942, insurance companies could, at will, assert fraudulent defenses, and deny the "principal and agent" relationship, in all claims arising out of insurance policy contracts. Most assuredly, the statute is not designed for the protection of insurance companies, but is designed for the protection of the thousands of people insured, and, said statute, is not against public policy and justice. The fundamental liberties protected by the Fourteenth Amendment do not include immunity from restraint so deeply rooted in policy and justice, and liberty of contract, as applied to the claimed federal question in this case, is not an absolute concept. *Hart-*

ford Acci. & Indem. Co. v. *Nelson Mfg. Co.*, 166 Miss. 222, 147 So. 815, 291 U.S. 352, 358. When the policy of insurance was written by appellant, it was written subject to the applicable law of Mississippi, which was, or should have been, well known to appellant in the operation and conduct of its insurance business.

The case of *Mut. L. Ins. Co.* v. *Hilton-Green*, 241 U.S. 613, cited by appellant (p. 15, Statement As To Jurisdiction) is not applicable since the facts therein materially differ from this case, and the Florida statute, there construed, while similar, does not contain the provisions relative to "burdens imposed by law" as does Section 5706 of the Mississippi Code of 1942. The Supreme Court of Mississippi did not construe the Mississippi statute, *supra*, so as to increase the authority of appellant's insurance agent, but gave meaning and purpose to effectuate justice in relation to insurance policies and the common law rule of principal and agent.

Contractual rights are of public importance, but are of greater importance to policyholders. Therefore, we submit that, in this case, reasonable state regulation, public policy, and justice, outweighs the federal question presented, in favor of appellee and the thousands of present policyholders, and future policyholders. The nullification of the Mississippi statute, if applied in this case as being repugnant to the Fourteenth Amendment to the Constitution of the United States, will interfere with the rights of these thousands of policyholders, who will lose their rights under the present well-established state law. Therefore, for the foregoing reasons, appellee submits that the federal question is not substantial and merits no further consideration.

CONCLUSION

We most respectfully urge that, we believe if a review of this case is granted, the "gateway" will be open in Mississippi, as well as in other states, for losing litigants to claim grounds for review by simply raising in the state's highest court, for the first time, in a petition for rehearing, a federal question, whenever and wherever a state statute is casually mentioned in an opinion of the highest state court—without regard to state procedure, timeliness, or how frivolous the question may be.

Therefore, pursuant to Rule 16(1) (a) and (1) (b) of this Honorable Court, appellee moves that this appeal be dismissed, and a review be denied, on the grounds that: (1) there is a want of jurisdiction; (2) the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; (3) the judgments and opinions of the Supreme Court of Mississippi rested on adequate nonfederal basis and on adequate state grounds; and (4) the question is insubstantial.

Respectfully submitted,

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